

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of)	MM DOCKET NO. <u>93-135</u>
)	
THE PETROLEUM V. NASBY CORPORATION)	File No. BRH-890601VB
)	
For renewal of Station WSWR (FM))	
Shelby, OH)	
)	
THE PETROLEUM V. NASBY CORPORATION)	File No. BTCH-921019HX
)	File No. BTCH-921019HY
For transfer of control of Station)	
WSWR (FM), Shelby, OH)	

TO: The Honorable Edward J. Luton
Administrative Law Judge

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MAR 25 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY FINDINGS OF FACT
AND
CONCLUSIONS OF LAW
OF
THE PETROLEUM V. NASBY CORPORATION

The Petroleum V. Nasby Corporation (Nasby) through counsel hereby submits its proposed reply findings of fact and reply conclusions of law in response to the proposed findings of fact and conclusions of law submitted March 4, 1994 by the Chief, Mass Media Bureau (Bureau) of the Federal Communications Commission (FCC or Commission).¹

1. The Bureau apparently takes the position that Nasby should be disqualified as a licensee notwithstanding Thomas L. Root's (Root) lack of involvement in the day-to-day management and operation of Nasby and Station WSWR, and the stipulations it reached with Nasby which conclusively state that Nasby and its principals other than its former principal Root had no involvement

¹ On March 18, 1994 Nasby filed a consent motion for extension of time to file reply findings/conclusions by March 25, 1994. The consent motion remains pending.

with the underlying matters for which Root was adjudged guilty. Yet, in taking that position, the Bureau purposely ignores the record evidence of this case as well as relevant Commission precedent in order to reach its desired result. Indeed one could ponder why a hearing was even necessary in light of the Bureau's apparent desire to extract some form of retribution from Nasby where it apparently has not been successful in extracting such retribution directly from Root. Whatever the Bureau's motivations, it is absolutely impermissible for those motivations to permeate this proceeding as reflected by the Bureau's position that Nasby should be disqualified notwithstanding the record evidence and Commission precedent.²

Conviction Issue

2. The Bureau's "boot strap" argument relied upon in its quest to reach its desired conclusion that Nasby should be disqualified can be summarized as follows: Root was involved in activities involving FCC licensing proceedings during a time period when he was a principal of Nasby, which certain of the activities were found at a later time period, subsequent to Root's withdrawal from Nasby, to consist of misconduct for which Root was adjudged guilty. The activities involved misconduct related to FCC

² The Bureau devoted only 4 1/2 pages of its 16 page brief to proposed conclusions -- in reaching the conclusion that Nasby -- a 12-year licensee -- should be disqualified under either of the designated issues. Moreover, at hearing, cross-examination or re-cross by Bureau counsel lasted considerably less than the approximate 2 1/2 hours the entire hearing session lasted, which also included an exhibit admission session. The Bureau proffered no rebuttal testimony.

licensing proceedings where Root served as legal counsel to various applicants for new FM stations formed by Sonrise Management Services, Inc. (Sonrise) and since Root had been a principal of Nasby at an earlier time, his actions according to the Bureau must arbitrarily be imputed to Nasby even though it is undisputed that Nasby had no involvement in Root's law practice nor was otherwise knowledgeable of Root's activities which took place some 400 miles away and did not involve the day-to-day management, operation or control of Nasby and Station WSWR. In order to bypass the record evidence including stipulations by the Bureau that Nasby had no connection with Root's individual actions which resulted in his convictions, the Bureau attempts to rely on FCC precedent that would purport to prohibit the separation of a wrongdoer from other shareholders in reaching a determination on the basis of an applicant's/licensee's character qualifications. As will be demonstrated, the caselaw relied upon by the Bureau is not remotely comparable on the facts of this case and the desired result espoused by the Bureau based on its gross and purposeful misreliance on such caselaw flies in the face of direct Commission precedent which supports the grant of Nasby's applications herein.

3. There is no dispute that Root was adjudged guilty in various federal and state courts for which he remains imprisoned. However, it is undisputed that Root resigned from all ownership positions with Nasby prior to his convictions. The Bureau argues (§ 24) that Root's resignations from Nasby prior to his convictions is unavailing, citing, *TV 9, Inc. v. FCC*, 495 F.2d 929, 939-40

(D.C. Cir. 1973). Nasby is not clear as to what the Bureau is specifically referring to when it uses the word unavailing. If it means that TV 9 supports the proposition that Root's severance of ties with Nasby prior to his convictions cannot in any way be considered in a hearing to inquire about an applicant's/licensee's qualifications to remain a Commission licensee, that is just plain wrong. Nasby has never argued that Root's severance of ties with Nasby prior to Root's convictions is the *only* factor to be considered in support of Nasby's qualifications to remain a Commission licensee. On the other hand, it is clearly a relevant factor to consider under TV 9, as well as other Commission precedent, e.g., *Sande Broadcasting Co., Inc.*, 61 F.C.C.2d 305 (1976), which was decided subsequent to the Court of Appeals decision in TV 9. When this factor is combined with other relevant factors, which include, *inter alia*, that Root had no involvement in the day-to-day management, operation or control of Nasby and Station WSWR, it is clear that the Bureau must compartmentalize its arguments and ignore record evidence in its quest to reach its desired result.

4. The Bureau's reliance (§ 25) on *Marr Broadcasting Company, Inc.*, 2 FCC Rcd 6596 (1987), citing *West Jersey Broadcasting Co.*, 90 F.C.C.2d 363, 371 (Rev. Bd. 1982), is also misplaced. *Marr* involved a comparative renewal challenge wherein *all* of the principals of the incumbent licensee were found by the Presiding Judge to have been involved in a "repeated and pervasive pattern of misrepresentation and lack of candor" involving misrepresentations

made directly to the Commission in letter filings and applications directly affecting and involving the station. In denying the incumbent licensee's second proposed settlement wherein the incumbent licensee's principals proposed to individually own nonvoting stock in the new permittee, the Review Board held that construction permits could only be awarded to fully qualified applicants, which the individual principals were not due to their involvement with a corporation they individually owned which was disqualified as a Commission licensee based on their individual actions. *Id.*, at 6596-67. These facts are not present here and the applicable precedent to be followed is that which Nasby cited in its proposed findings.

5. It is interesting that the Bureau argues on one hand that Root's role, if any, is not relevant to the Commission's determination of Nasby's character qualifications. Rather the mere fact that Root was a former principal of Nasby and was convicted for activities which may have occurred when he was a principal of Nasby is in the Bureau's view, sufficient to disqualify Nasby. The Bureau also takes the position that Root was active in Nasby and therefore under these circumstances, it further supports Nasby's disqualification. In support of this argument, the Bureau characterizes selected portions of the record evidence to somehow support its argument. At ¶¶ 26-28 of its brief, the Bureau lists activities which it believes shows involvement by Root. These activities include legal matters which Root reviewed in his position as the station's legal counsel prior to his resignation as

counsel in April 1990, over two years prior to his convictions. The Bureau refers to review of matters by Root "purportedly" as the station's attorney. There is nothing in the record evidence which suggests anything other than precisely that.

6. If the Bureau had any evidence to the contrary it should have been presented to the Commission. No such evidence was provided. Extensive document production and answers to interrogatories were filed by Nasby in response to the Bureau's discovery requests which largely focussed on the management, operation and control of Nasby. The discovery responses as well as the record evidence reflect that the management, operation and control of the station rests with Timothy J. Moore (Moore), the President of Nasby and its General Manager since 1988 (first acting, then permanent), and prior to Moore, David L. Williamson (Williamson). If the Bureau chooses to ignore pertinent record evidence in order to focus on matters which required action of the board, at a time when Root was a board member, or involvement by Root in his capacity as legal counsel for the station, it does so only to further support its desired result of having Nasby disqualified. There is no doubt that Root during the course of his tenure was one of three members Nasby's board, was an officer of Nasby, was a shareholder of Nasby, or served as legal counsel for Nasby. There is also uncontroverted evidence in the record that subsequent to Root's resignations and divestiture of stock interests, he had no further connection or involvement whatsoever with Nasby, other than assistance with an ownership report due to

be filed shortly after Root's resignation as legal counsel and prior to Nasby's securing new counsel. Moreover, if there was any evidence that Moore (or Williamson during his tenure) was not in complete control of the station, as has been demonstrated by Nasby, the Bureau had plenty of opportunity to provide rebuttal evidence or even take the depositions of station employees, etc. It did not.

Transfer of Control Issue

7. The Bureau independently reaches its desired result that the cumulative stock transfers which occurred without prior FCC approval should also result in the disqualification of Nasby. Once again, come hell or high water, the Bureau would arbitrarily impose the actions of Root on the applicant in order to compel disqualification. The Bureau claims without record evidence support that the transfer of control was not inadvertent. In support of its argument it concludes that Root was a communications attorney and served as counsel for Nasby, and that the ownership changes were not reported via an ownership report until nearly a year had elapsed. From this the Bureau concludes that the "totality of evidence strongly suggests intentional deception, and a motive can easily be inferred from Thomas L. Root's legal difficulties" (§ 32).

8. Once again, to reach this conclusion pertinent record evidence is ignored by the Bureau. Moore, as President and General Manager of Nasby, testified that he relied on Root to handle matters for Nasby before the FCC. That is what attorneys do for

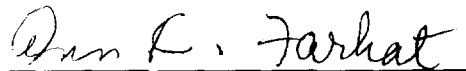
clients. Moore testified that Root provided legal services to Nasby in a routine manner. Root's spouse Kathy G. Root also provided testimony which reflected that she relied upon Root to handle whatever paperwork was necessary as he served as the station's attorney. No evidence to rebut this testimony was provided by the Bureau.

9. The transfers took place in 1989 prior to Root's indictment and prior to his resignations from positions held with Nasby. If the transfers had been filed with the FCC at that time, they would no doubt have been routinely granted. Moreover, when Root was indicted in March 1990, and resigned from positions held with Nasby (for which the existence of the indictments and the reasons for his resignations were not made known to Nasby and its principals at that time), the pending renewal application was amended within 30 days from these events at which time the ownership report submitted with the renewal application in June 1989 was also amended. The fact remains that ownership information generally is not required to be provided except on an annual basis. Moreover, upon securing new counsel, the cumulative stock transfers were directly brought to the FCC's attention by the filing of the transfer of control application herein. There has been no intentional deception by Nasby and on the contrary, it can certainly be inferred from the record evidence that the activities engaged in by Root in 1989 which may have led to his later convictions were obviously the focus of his attention or inattention to legal matters on behalf of Nasby and no doubt other

Root clients, and could easily be the reason Root never focussed on the cumulative stock transfers and the need to seek prior FCC approval. To somehow attribute his failure to provide legal services to Nasby in the manner to which it was entitled and previously enjoyed in such a way as to punish Nasby by disqualification is unsupportable and clearly draconian under the circumstances here.

For the foregoing reasons as well as the reasons set forth in The Petroleum V. Nasby Corporation's proposed findings of fact and conclusions of law previously filed, the record evidence and Commission precedent warrant the unconditional grant of Nasby's renewal application and transfer of control applications herein.

Respectfully submitted,


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March 25, 1994

CERTIFICATE OF SERVICE

Ann C. Farhat, a member of the firm of Bechtel & Cole Chartered, certifies that on March 25, 1994, she caused copies of the foregoing Proposed Findings of Fact and Conclusions of Law of The Petroleum V. Nasby Corporation to be served by hand on the following individuals:

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